

1 Carrie M. Francis (020453)
2 Stefan M. Palys (024752)
3 Michael Vincent (029864)
STINSON LLP
4 1850 North Central Avenue, Suite 2100
Phoenix, Arizona 85004-4584
Tel: (602) 279-1600
Fax: (602) 240-6925
Email: carrie.francis@stinson.com
stefan.palys@stinson.com
michael.vincent@stinson.com

7 Attorneys for Defendants

8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF ARIZONA**

10 Jeremy Thacker,

11 Plaintiff,

12 v.

13 GPS Insight, LLC; Robert J. Donat,
14 Individually and as Trustee of The
Robert Donat Living Trust Dated April
19, 2017,

16 Defendants.

No. 2:18-cv-00063-PHX-DGC

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION IN LIMINE
NO. 2 – ARGUMENT RE:
“FAILURE TO DISPUTE”**

17 This is yet another previously addressed issue. (Doc. 151 (Court found issue of
18 fact for jury to resolve regarding Plaintiff's credit card use, and noted “Plaintiff admits to
19 making the personal charges, and did not object to their deduction”). The difference is
20 now Plaintiff seems to suggest he objected to all deductions at issue, whereas the last time
21 this was raised he conceded he had taken issue with only *some* charges, so what to make
22 of his use of a GPSI card for personal expenses was a matter for the jury. *Compare* Doc.
23 179 (motion *in limine*) with Doc. 127 at 19 (“Thacker also knew that some personal
24 expenses were going to be deducted” but “disputes some of the charges.”). As the Court
25 previously ruled, there is a factual dispute concerning the evidence that the jury should
26 resolve. (Doc. 151 at 21-23).

27 The evidence at issue is relevant to both Plaintiff's tortious interference and
28 defamation claims. To summarize the prior briefing on this issue, (Docs. 112 at 8, 127 at

1 19, 133 at 8), as background, in 2014, Plaintiff was warned if he used a GPSI card for
 2 personal expenses again, he would be terminated. Shortly after his termination in 2017,
 3 GPSI found out Plaintiff had done just that. Charges included a weekend at a local spa,
 4 plane tickets for a female acquaintance, \$300 on Amazon, electronics for Thacker's
 5 house, a barware set, bedsheets, and \$400 for a flight that Thacker bought for a co-worker
 6 as a birthday present. (Doc. 112 at Exs. 25-26; Tr. Ex. 262-264). Donat's argument
 7 concerning tortious interference is that Plaintiff will be unable to show his employment
 8 with GPSI would continue absent the alleged interference because he would have been
 9 fired over these charges. (Doc. 171-1 at 6-7). As to defamation, Plaintiff claims Donat
 10 defamed him by supposedly stating that Plaintiff "stole," "bought toys illegally with the
 11 company credit card," and "was the subject of an ongoing prosecution for felony theft . .
 12 . ." (Doc. 171-1 at 11). Truth is a defense, and the transactions at issue are the basis of
 13 that defense. (*Id.*)

14 Plaintiff contends it "is so blatantly incorrect" that he did not dispute deductions
 15 from his final pay for these charges "that to allow this suggestion to the jury in opening
 16 statement or at any other time would be unfairly prejudicial." (Doc. 179 at 1). He
 17 contends that this is so because he supposedly *did* dispute the charges.¹ (*Id.* citing Tr. Ex.
 18 235). In exhibit 235, Plaintiff disputes the deductions for about \$50 of audio books and
 19 a particular flight as business expenses; but he does not dispute the remainder of the
 20 charges, like the barware set, spa weekend, birthday present flight, or sheets. This
 21 explains Plaintiff's prior concession that he "knew that some personal expenses were
 22 going to be deducted" but "disputes some of the charges." (Doc. 127 at 19)

23 The fact that Plaintiff did not dispute some of the charges tends to make it more
 24 likely that he knew they were improperly charged, and so is relevant to Donat's defense
 25 that GPSI would have terminated Plaintiff regardless of any alleged interference. Jason
 26

27 ¹ Plaintiff additionally references his arguments concerning the timeliness of the
 28 disclosure of evidence, which Defendants fully addressed in response to Plaintiff's Motion *in Limine* No. 1.

1 Walker will testify that, given the prior warning to Plaintiff about misusing the company
 2 credit card, he would have done just that over these charges. Moreover, Plaintiff's failure
 3 to dispute these charges tends to make it more likely that Donat's alleged statements were
 4 true – Plaintiff *did* steal, Plaintiff *did* buy toys illegally with the company credit card,²
 5 and the Scottsdale Police Department did refer their investigation of Plaintiff to the
 6 Maricopa County Attorneys' Office. (*See* Plaintiff's Ex. 104 (police report); Defendants'
 7 Ex. 215 (police report and supplements)). Indeed, while Plaintiff filed a kitchen-sink
 8 complaint, he did not sue for alleged wrongfully withheld pay as a result of the
 9 deductions.

10 The premise of the motion *in limine* is therefore wrong, whether Plaintiff is
 11 contending that he objected *in toto* to the deductions (he didn't) or whether he claims he
 12 "disputed their accuracy on summary judgment . . ." (Doc. 179 at 1:28; *compare* Doc.
 13 127 at 19 (Plaintiff's summary judgment brief: "Now that an accounting has been
 14 provided, he disputes *some* of the charges." (emphasis added)). Since the premise of
 15 Plaintiff's motion is incorrect, it should be denied. If he would like to dispute certain of
 16 the charges, he is free to present his version of the facts to the jury and let them decide.
 17 His motion presents no reason why *all* evidence on point should be excluded.

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RESPECTFULLY SUBMITTED this 5th day of December, 2019.

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STINSON LLP

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By: /s/ Stefan M. Palys

Carrie M. Francis

Stefan M. Palys

Michael Vincent

1850 North Central Avenue, Suite 2100
 Phoenix, Arizona 85004-4584

² It was literally toys. (Doc. 112-3 (6/24/16 charge for children's toys); Tr. Ex. 263)

SCHNEIDER & ONOFRY, PC

By: /s/ Timothy B. O'Connor [with permission]

Timothy B. O'Connor
365 East Coronado Road
Phoenix, Arizona 85004

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2019, I caused the foregoing document to be filed electronically with the Clerk of Court through ECF; and that ECF will send an e-notice of the electronic filing to:

Joshua W. Carden
JOSHUA CARDEN LAW FIRM, P.C.
16427 North Scottsdale Road, Suite 410
Scottsdale, AZ 85254
joshua@cardenlawfirm.com
Attorney for Plaintiff

Timothy B. O'Connor, Esq.
SCHNEIDER & ONOFRY, P.C.
365 East Coronado Road
Phoenix, Arizona 85004
toconnor@soarizonalaw.com
Attorneys for Defendant Robert Donat

I hereby certify that on December 5, 2019, a courtesy copy will be e-mailed to:

Judge David G. Campbell
United States District Court
Sandra Day O'Connor U.S. Courthouse, Suite 623
401 West Washington Street, SPC 58
Phoenix, Arizona 85003-2161

/s/ Linda Holder